



September 17, 2008

Letter Code: SFL et al

Via Email & Regular Mail

California Regional Water Quality Control Board, Lahontan Region
2501 Lake Tahoe Blvd.
South Lake Tahoe, CA 96150
Attn: Anne Holden - aholden@waterboards.ca.gov

Subject: Comments on Proposed Waiver Related to Vegetation Management Activities in the Lake Tahoe Basin and Adoption of a Memorandum of Understanding between TRPA and Lahontan

Dear Ms. Holden:

We submit the following comments on behalf of the Sierra Forest Legacy, the Tahoe Group of the Sierra Club and the League to Save Lake Tahoe. We also incorporate by reference our prior scoping comments on all issues that remain relevant to Lahontan's revised action.

I. INTRODUCTION

The proposed waiver and Memorandum of Understanding ("MOU") will transfer wholesale regulatory authority over "vegetation management activities" from Lahontan to TRPA. Currently Lahontan has an existing waiver and MOU that provides the conditions applicable to six specific categories of timber activities for which a waiver of waste discharge requirements is possible. Here, in contrast, there are no conditions that accompany the waiver and no discussion of TRPA's regulatory program or, more to the point, how TRPA intends to regulate these activities in the future.

As a result, this proposed waiver and MOU violate both the California Water Code and the California Environmental Quality Act ("CEQA"), and should not be adopted by the Board.

By transferring permitting authority to TRPA, the proposed waiver and MOU effectively repeal the conditions of the existing waiver applicable to timber activities in the Tahoe Basin (*See* Attachment A to Resolution R6T-2007-008, "Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest and Vegetation Management Activities", hereinafter referred to as the "2007 Waiver.") These conditions were adopted based on Lahontan's recognition that "vegetation management activities" such as those at issue in this proceeding have the potential for significant environmental impacts, particularly when conducted in sensitive areas such as steep hillsides or streamzones. The proposed action does not replace these conditions with any substantive standards, but instead simply delegates regulatory authority to TRPA, without any description of how TRPA proposes to regulate these activities.

It is our understanding from queries of TRPA staff and recent status review presented by TRPA to its Board (*see* Exhibit 1, attached hereto), that the recently-formed "Tahoe Fire and Fuels Team" (TFFT), which includes representatives from all Fire agencies with jurisdiction in the Basin and TRPA and Lahontan Water Board staff, would determine how TRPA intends to implement permitting for the vegetation management activities subject to the waiver. While we are pleased to learn that projects will undergo a coordinated review by the TFFT, we are concerned that Lahontan did not include or discuss this process information as part of the proposed action to adopt a new waiver and MOU with TRPA. Further, at this time, the TFFT process (including the anticipated fuels-specific checklist) has not yet been fully developed or finalized. TRPA's process (as it relies on the TFFT) should be finalized and adopted (as appropriate) before Lahontan transfers its regulatory role to TRPA, and this process should be included in the public information provided for Lahontan's proposed projects so the public is able to fully understand the proposed project and provide informed feedback.

3

For these reasons, we have real concerns about Lahontan's apparent abandonment of its regulatory authority to ensure that water quality and beneficial uses are protected in the Basin. The vegetation management activities for which regulatory authority is proposed to be delegated to TRPA have the potential for significant environmental impacts and discharges from such activities pose a substantial threat to water quality. Under state law, Lahontan is the agency with oversight authority over activities affecting water quality. State law requires that Lahontan, as one of the Regional Water Quality Control Boards, retain primary responsibility for ensuring that the impacts of logging and clearing of vegetation do not jeopardize the attainment of water quality objectives mandated by the federal Clean Water Act, the state Porter Cologne Act and the Basin Plan.

4

We continue to believe that the current pressure to streamline permitting for activities that will aid in fuel reduction need not result in an unregulated environment that will lead to deterioration of water quality objectives and the impairment of beneficial uses. Nothing in the record suggests that the existing terms of the 2007 waiver have somehow "delayed" worthy vegetation management activities from taking place. Instead, the evidence demonstrates numerous examples of Lahontan working in collaboration with other agencies and private stakeholders to ensure that necessary activities be implemented, but in a manner that protects water quality.

As set forth below, the current project as proposed is contrary to applicable Water Code provisions, as well as the California Environmental Quality Act ("CEQA"). For that reason, we ask that the Lahontan Board not approve the proposed waiver and MOU and instead work with staff and TRPA to come up with a more protective – and informed – working arrangement to ensure that the precious environmental values in the Basin are preserved.

//
//
//
//
//

II. BACKGROUND

A. Proposed Action and Negative Declaration

The proposed Resolution and action before the board is for the Board to adopt a waiver of waste discharge requirements for all “vegetation management activities” regulated by TRPA, pursuant to a memorandum of understanding that the Board will also adopt as part of the project. (See RESOLUTION NO. R6T-2008-(PROP). Vegetation management activities are defined broadly to include the full spectrum of fuel reduction activities that will occur in Tahoe in the next decade.¹

The proposed Resolution appears to constitute the waiver: The Resolution states “the Water Board finds that waiving the filing of a ROWD and waste discharge requirements for the following types of vegetation management activities within the area of mutual jurisdiction of the TRPA and the Lahontan Water Board is *in the public interest* when effectively regulated by the TRPA.”

To comply with CEQA, Lahontan has proposed to adopt a negative declaration. The proposed Resolution states that the Board has considered the negative declaration and determined there will be no significant adverse impacts to the environment from the waiver of filing a report of waste discharge and/or waste discharge requirements for the categories of projects specified herein that are regulated by the TRPA.”

The negative declaration describes the baseline and future activities as follows:

For this project, baseline conditions are not represented by the statement "no project", since all of the land management and most of the local fire agencies have been actively treating hazardous fuels near communities for many years. The National Fire Plan (2001) identified eight communities in the California portion of the Lake Tahoe Basin as "communities at risk." In response, over 14,000 acres of fuel reduction treatments have been completed in the Lake Tahoe Basin since 2000 (including the Nevada portion of the Lake Tahoe Basin, outside this MOU project area), averaging 1,856 acres annually in 2005–2006. Many urban lots have been treated as well, with the help of 21 local "Fire Safe" chapters formed through the Tahoe Regional Office of the Nevada Fire Safe Council.

In addition to the already completed vegetation management projects described above, a large number of fuels treatment and maintenance treatment projects are currently proposed.

¹Vegetation management activities include: a) fuel reduction; b) forest thinning; c) environmental improvement (such as forest enhancement, riparian enhancement, and aspen stand enhancement); d) burned area rehabilitation; e) hazard tree removal; f) site preparation that involves disturbance of soil, burning of vegetation, or herbicide/pesticide application; or g. cutting or removal of trees and vegetation, together with all the work incidental thereto, including, but not limited to, construction, reconstruction and maintenance of roads, fuel breaks, stream crossings, landings, skid trails, or beds for the falling of trees.

In all, over 6,000 fuel reduction treatments are proposed in the 10-year plan. Treatment sizes ranges from 0.1-acre urban lots to 500-acre general forest treatments. Combined, these represent approximately 68,000 acres of fuel reduction treatments proposed and prioritized for the next 10 years. These projects represent another baseline condition, as they were already identified prior to consideration of this proposed MOU.

The Resolution resolves that:

1. The Water Board waives the filing of a report of waste discharge and/or waste discharge requirements for the vegetation management activities and discharges as specified above.
2. The Water Board does not waive the filing of WDRs where an EIR for that proposed vegetation management activity was prepared with a Statement of Overriding Considerations for any water quality factor.
3. The Water Board authorizes and directs the Executive Officer to enter into a MOU with the TRPA describing the types of vegetation management activities, application review and permitting procedures, notification and coordination responsibilities, dispute resolution procedures, and general provisions to ensure each is complying with the MOU.
4. Any project requiring Water Quality Certification under Section 401 of the Clean Water Act must obtain that certification from the Water Board prior to discharging.
5. The Water Board certifies the Negative Declaration for this waiver and directs the Executive Officer to file all appropriate notices.
6. This action waiving the filing of a report of waste discharge and waste discharge requirements is conditional and the Executive Officer can recommend the Water Board adopt waste discharge requirements for any of the specific types of vegetation management activities or discharges, or any individual vegetation management activity or discharge, identified in the MOU with the TRPA.

See Resolution, p. 4.

The Memorandum of Understanding states that:

TRPA will have responsibility for reviewing vegetation management activity proposals, issuing permits as appropriate, conducting inspections, and taking enforcement action as necessary to ensure compliance with permits and applicable regulations. This includes exempt and qualified exempt activities, as defined in the TRPA Code of Ordinances.

MOU, p. 2, ¶ 1. The MOU also states that the “Water Board will not normally issue a permit, but may be involved in consultation and coordination with TRPA staff.” *Id.*, p. 3, ¶ 4.

The MOU also transfers authority to TRPA to make determinations regarding exemptions to discharge prohibitions:

The agency issuing a permit for the vegetation management activity, whether TRPA or the Water Board, will be solely responsible for approval of exemptions to prohibitions related to SEZ disturbance. Granting of such exemptions will not be delegated to an agency not a party to this MOU. Exemptions shall be considered in accordance with the TRPA Code of Ordinances or the Water Quality Control Plan for the Lahontan Region (Basin Plan), depending on the agency issuing the permit.

Id., p. 3, ¶ 6.

The MOU states that the “the lead permitting agency, in most cases TRPA, will consult the other agency, typically the Water Board, during the application review period for proposed vegetation management activities that includes any one or more of the following items:

- a) Permanent crossings bridging a perennial reach of a watercourse.
- b) Temporary “wet” crossings (vehicles crossing through a channel when water is present).
- c) Herbicide/pesticide use, excluding use of Borax/Sporax.
- d) New road construction over 3000 linear feet, temporary road construction that will not be decommissioned prior to the winter, or new or temporary road construction on slopes over 30 percent.
- e) Treatment areas of more than five hundred (500) total acres or one hundred (100) acres of verified stream environment zone lands.
- f) Equipment operations on slopes over 30 percent. “

Id., p. 4, ¶ 9.

“Such consultation may include, but not be limited to, technology sharing, and discussion of Best Management Practices and appropriate control and mitigation measures as represented through the permit conditions. Consultation activities will occur in a manner that does not alter the normal permitting time that the lead permitting agency is committed to follow and lack of timely response by the other agency will not delay project permitting.” *Id.*

III. SPECIFIC COMMENTS ON THE PROPOSED ACTION

A. The Proposed Action Has Changed Since the Scoping Comments

The current proposal differs from that presented in the scoping.

First, Lahontan has rethought its approach on the proposed new waiver, which now appears to be simply an unconditional transfer of permitting authority to TRPA over vegetation management activities in the Tahoe Basin. At this point, it is unclear how prior scoping documents presented by



Lahontan about substantive changes that would occur due to the waiver change are still relevant to the current proposed action.²

6

Second, the prior proposal discussed a Memorandum of Understanding (MOU) between Lahontan and TRPA that would be adopted as part of the project to complement the conditions for the new waiver. The scoping comments did not provide a version of the draft MOU. Now, Lahontan has provided the terms of the draft MOU. However, in the current proposal, the MOU sets the conditions that will apply to the new waiver, rather than the other way around, as was previously the case.

In sum, the new project proposes to repeal the terms of the existing waiver and replace them with the general provisions of the proposed MOU. However, as discussed below, the MOU transfers regulatory authority from Lahontan to TRPA for all vegetation management activities, without any substantive conditions or any discussion of how water quality and sensitive habitat will be protected or how such projects will be processed by TRPA.

7

B. The Waiver Violates the Water Code

A Regional Board may waive waste discharge requirements for a “type of discharge” if it finds that such waiver is “consistent with any applicable state or regional water quality control plan and is in the public interest.” Water Code 13269(a)(1). A waiver may not exceed five years in duration, but may be renewed by the regional board. The waiver “shall be conditional and may be terminated at any time” by the regional board.

Here, the proposed waiver violates the Water Code because 1) it does not include the required monitoring component; 2) does not comply with the Basin Plan; and 3) is not in the public interest.

1. The Waiver Does not Comply with Water Code § 13269 because it lacks monitoring requirements.

8

The Water Code requires any waiver to include detailed monitoring provisions “verifying the adequacy and effectiveness of the waiver’s conditions,” which results “shall be made available to the public.” Water Code § 13269(a)(2). The Regional Board may waive the monitoring requirements for “discharges that it determines do not pose a significant threat to water quality.” Water Code § 13269(a)(3).

²To the extent they are relevant, we reiterate our concerns regarding these proposed changes, as set forth in our scoping comments. However, because these changes were not presented or discussed in the Initial Study-Negative Declaration (“IS/ND”), if Lahontan intends to rely on the previous project description for the present action, it must recirculate a new CEQA document that accurately identifies the project being proposed. *See* Discussion, Section III.C.3, *infra*, regarding inadequate project description.

The purpose of monitoring is to insure that water quality objectives are being met as part of the waiver conditions. Here, the waiver includes no conditions, and further provides no mechanism to insure that the environment will be protected as fuel reduction on approximately 68,000 acres over the next decade occurs. *See* Water Code § 13269(a)(2).

The current waiver has a monitoring requirement, entitled “Implementation, Forensic and Effectiveness Monitoring and Reporting Program (MRP) Order No. R6T-2007-0008, Attachment 2 for Individual Dischargers under Waiver of Waste Discharge Requirements for Discharges Related to Timber Harvest Activities.” These monitoring requirements were found necessary by Lahontan in 2007 to ensure that projects being waived did not pose a risk to water quality and that conditions imposed in 2003 were effective in avoiding a significant threat to water quality. However, the current proposal says nothing about how monitoring will occur for future projects.

Here there are no monitoring requirements and the evidence shows that the discharges in question *do* pose a significant threat to water quality. For example, the SNEP report noted that:

Given that average angular canopy densities (canopy measured at an angle that effectively blocks summer sun) of 75% were observed on unlogged first- and second order channels in the northern Sierra Nevada (Erman et al. 1977), removal of riparian trees has a tremendous effect on aquatic habitat. The cumulative effects of timber harvest are widespread but poorly documented in the Sierra Nevada. Most of the timberlands in the Sierra Nevada lie within national forests. Despite this single ownership of large areas, and despite the mandate for the Forest Service (and other agencies) to analyze cumulative impacts of forest management activities, very little basic data collection on peak stream flow and sediment yield (the variables likely to be affected by timber harvest) is undertaken on the forests. Most field data collection and office analyses are apparently devoted to cumulative effects "assessment methods" (see Berg et al. 1996) that primarily involve office-based computations of such variables as area of road surface and timber harvest within a watershed to predict cumulative impacts. These computations of effects are not verified by actual field measurements of peak flow or sediment yield, and in some cases, the results of these "methods" have been contradicted by field observations of Forest Service biologists (Kondolf 1994a)

See Exhibit 2, SNEP Report Ch. 36, Status of Riparian Habitat.

Lahontan’s prior waivers adopted in 2003 and 2007 demonstrate that the fuel reduction activities in sensitive areas have the potential for adverse environmental impacts to water quality. *See e.g.*, Exhibits 9-10, attached hereto. Indeed, Lahontan’s review and responses to scoping comments on this project demonstrates that such activities have the potential for significant impacts and that monitoring is necessary to ensure that mitigation measures and best management practices are in fact achieving the necessary level of protection. Initial Study/Negative Declaration for 2003 waiver; Summary of Early Consultation Scoping Comments dated July 17, 2008.

2. The Waiver Does Not Comply with the Basin Plan

Under Water Code § 13269(a)(1) any waiver must be “consistent with any applicable state or regional water quality control plan.” Here, Lahontan cannot make a finding that its complete delegation of authority to TRPA of permitting authority for vegetation management activities on approximately 68,000 acres within the Tahoe Basin is consistent with the Basin Plan.

9

Both Lahontan and TRPA are committed to achieving Basin Plan water quality objectives in part through the adoption of Total Maximum Daily Loads (“TMDLs”). However, Lahontan’s current TMDL process assumes a particular load allocation for timber and other vegetation management activities that does not assess the potential load increases that will be caused by the 6,000 fuel reduction projects on approximately 68,000 acres over the next 10 years. Further, the current TMDL documents assume a level of protection to water quality from vegetation management activities that is based on the conditions set forth in the 2007 Waiver. However, the proposed project eliminates these conditions, including those for monitoring and protection of sensitive habitats. Thus, the current assumptions on which Lahontan and TRPA are proceeding as to how TMDLs will lead to the achievement of water quality objectives are no longer valid.

10

In addition, the proposed waiver proposes that TRPA will be authorized to grant exemptions to discharge prohibitions. *See* Resolution *Id.*, p. 3, ¶ 6. (“agency issuing a permit for the vegetation management activity, whether TRPA or the Water Board, will be solely responsible for approval of exemptions to prohibitions related to SEZ disturbance.”) However, no information is provided as to what criteria TRPA may use to determine if an exemption to a discharge prohibition is warranted. To the extent that TRPA were to find that the proposed vegetation management activities will be exempted from such discharge prohibitions, this has the potential to increase loading that has not been considered in the current TMDL Basin planning.

11

The Basin Plan also requires Lahontan to protect a number of beneficial uses, including 22 beneficial uses specifically identified in the 2007 waiver as potentially affected by timber activities and waiver conditions, including Preservation of Biological Habitats of Special Significance (BIOI), Cold Freshwater Habitat (COLD), Commercial and Sportfishing (COMM), Flood Peak Attenuation/Flood Water Storage (FLO), Freshwater Replenishment (FRSH), Ground Water Recharge (GWR), Migration of Aquatic Organisms (MIGR), Municipal and Domestic Supply (MUN), Rare, Threatened, or Endangered Species (RARE), Spawning, Reproduction, and Development (SPWN), Wildlife Habitat (WILD) and Water Quality Enhancement (WQE).

The 2007 Waiver noted that all of these beneficial uses could be adversely affected by timber activities including the fuel reduction activities proposed for this waiver. The SNEP Report notes, for example, that:

Riparian areas are sites of exceptional ecological importance, typically having greater species diversity (floral and faunal) than surrounding uplands and providing essential food sources or habitat at certain life stages for upland wildlife species. Riparian areas also play a key role

in maintaining water quality and aquatic habitat in streams and rivers, and because of their linear nature, riparian corridors are important routes for wildlife migration. The riparian areas of the Sierra Nevada have been extensively affected by direct removal or inundation of riparian vegetation and by alterations to the conditions on which the riparian vegetation depends. Unfortunately, the field data base necessary to properly assess the health of riparian areas throughout the Sierra Nevada does not exist. However, from the extent of human activities known to affect riparian areas, we can infer substantial impacts. Moreover, map and aerial photograph analyses of a large sample of Sierran watersheds show that virtually all riparian corridors are interrupted by gaps caused by such human activities such as construction of road or railroad crossings, human settlements, dewatering of streams, grazing, timber harvest, and mining. The largest gaps are caused by reservoirs, many of which exceed 0.5 km (0.3 mi) in length, and which occur at a wide range of elevations in the Sierra Nevada. Establishing riparian management zones (or "buffer strips") of adequate width is probably the single most effective strategy for protection and maintenance of the ecological values of riparian areas. Vegetation removal and ground disturbance should be prohibited in these zones, both to preserve the riparian habitat itself and for its beneficial influence upon aquatic habitat. Although the width of these zones has most commonly been set arbitrarily, variable-width buffer strips (based on attributes of the river itself, the riparian community, and hill-slope gradients) can be established to better protect riparian resources. ...Restoration of riparian habitat, if based on careful analysis and on experience, can re-create many lost values to riparian and aquatic habitats.

See Exhibit 2, SNEP Report Ch. 36, Status of Riparian Habitat.

Here, as discussed below, the proposed waiver sets forth no plan for how these beneficial uses will be protected. Instead, the evidence shows that existing waiver conditions designed to protect these uses will be repealed and replaced by a new set of standards and guidelines that have not yet been adopted, but which are intended to allow for the removal of riparian vegetation, and use of heavy machinery, pile burning and chipping in the stream zone. Further, the plan provides no requirements or information regarding the monitoring that must be done to ensure that these beneficial uses are not harmed.

Further, TRPA is still in the process of updating its thresholds that would relate to these beneficial uses, including thresholds for vegetation, stream habitat and wildlife. At this time, TRPA has no updated threshold in place for these affected resources, despite the Compact's requirement that thresholds be updated every 5 years. Further, it does not appear that TRPA has conducted any analysis of the effects that permitting 68,000 acres of vegetation management activities will have on its ability to meet its threshold goals. To the extent TRPA is just beginning to consider this process, TRPA is not at this time in compliance with its own threshold requirements.

In the absence of specific direction as to how aquatic habitats and other related beneficial uses as set forth above will be protected, and in the absence of updated thresholds pertaining to these resources, TRPA has no plan in place for meeting its Basin Plan requirements to protect these

beneficial uses. For this additional reason the waiver does not comply with the Basin Plan.

✓ 14

3. The Waiver is Not in the Public Interest

Lahontan's waiver is not in the public interest because it purports to transfer regulatory jurisdiction to TRPA for permitting vegetation management activities before TRPA and other agencies, including Lahontan, have come together in agreement to identify the appropriate permitting procedures and substantive conditions to ensure that water quality and beneficial uses in the Basin are adequately protected. It is not in the public interest for Lahontan first to give up its regulatory authority, and then later work out the details of how the transferred authority will be implemented by the transferee agency, TRPA. *See* Exhibits 1, 9-10, attached hereto.

15

C. Lahontan's Proposal to Approve the Waiver/MOU Through the Adoption of a Negative Declaration Violates CEQA

Lahontan's decision to consider approval of proposed Waiver/MOU through the adoption of an Initial Study-Negative Declaration (IS/ND) is contrary to CEQA for a number of reasons. The proposed action here is the transfer of Lahontan's permitting authority to TRPA to oversee the implementation of approximately 68,000 acres of vegetation management activities, including vegetation removal on steep slopes and in stream-zones. The project effectively repeals existing waiver conditions designed to avoid the potential for significant impacts. The project does not provide direction as to how TRPA will implement its authority obtained through the waiver.

16

Lahontan's decision to consider approval of this project using an IS/ND violates CEQA because a fair argument can be raised that the elimination of the protective conditions required by the 2007 Waiver has the potential for significant impacts on the environment when applied to the extensive fuel reduction activities portended for the Basin. Further, the IS/ND fails to satisfy CEQA's informational requirements because it provides no information how TRPA will regulate vegetation management activities on 68,000 acres within the Basin and how sensitive environmental resources may be affected by the elimination of the 2007 Waiver conditions.

17

1. CEQA Background

CEQA applies to discretionary activities undertaken by a public agency. Pub. Res. Code § 21080. Lahontan is subject to CEQA as a state agency making a discretionary decision with the potential for impacts to the physical environment. Pub. Res. Code § 21100. As part of CEQA review, the agency undertakes an "Initial Study" of the project. 14 Cal. Code Regs. § 15063. If such Study demonstrates that the project will not have a significant effect on the environment, the agency makes a "negative declaration" to that effect. Pub. Res. Code § 21080(c.) If the "Initial Study" determines that the project *may* have a significant effect, an Environmental Impact Report ("EIR") is required. Pub. Res. Code § 21151.

CEQA defines a "significant effect" as a "substantial, or potentially substantial, adverse

change." Pub. Res. Code § 21068. This means that an activity has a significant effect if it "has the potential to degrade the quality of the environment." *Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App. 4th 1165, 1192.

The CEQA Guidelines require a mandatory finding of significance for a project with "possible environmental effects which are individually limited but cumulatively considerable." "Cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." 14 Cal. Code Regs. § 15065(c); *Communities For a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 114; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App.3d 692, 720-721.

CEQA's fundamental policy is that all public agencies "shall regulate such activities so that major consideration is given to preventing environmental damage." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390; Pub. Res. Code § 21000(g.) The "primary means" by which the legislative goals of CEQA are achieved is the preparation of an EIR. *Laurel Heights, supra*, 47 Cal.3d at 392; Pub. Res. Code §§21080(d), 21100; 14 Cal. Code Regs. § 15080. The EIR has been described as "an environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Laurel Heights, supra*, 47 Cal.3d at 392; *County of Inyo v. Yorty* (1973) 32 Cal. App.3d 795, 810. An EIR is intended to serve as "an environmental full disclosure statement." *Rural Land Owners Assn. v. City Council of Lodi* (1983) 143 Cal. App.3d 1013, 1020.

CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. § 15002(a)(1). In addition, an EIR must identify mitigation measures and alternatives to the project which may reduce or avoid the project's significant adverse impacts, thus accomplishing CEQA's basic statutory goals. *See Laurel Heights, supra*, 47 Cal.3d at 400-403; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; Pub. Res. Code §§ 21002, 21002.1. This analysis of feasible mitigation measures and a reasonable range of alternatives is crucial to CEQA's substantive mandate that significant environmental damage be substantially lessened or avoided where feasible. Pub. Res. Code §§ 21002, 21081; 14 Cal. Code Regs. §§ 15002(a)(2) and (3). *Laurel Heights, supra*, 47 Cal.3d at 392, 404-405. CEQA requires government agencies to disclose to the public the reasons why they have approved a particular project resulting in significant environmental effects. 14 Cal. Code Regs. § 15002(a)(4). "The EIR process protects not only the environment but also informed self-government." *Laurel Heights, supra*, 47 Cal.3d at 392.

CEQA must be interpreted so as to afford the fullest possible protection to the environment. *Laurel Heights, supra*, 47 Cal.3d at 390; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259. EIRs demonstrate to an apprehensive citizenry that the agency has analyzed and considered the ecological implications of its action. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.

Where the lead agency finds that significant adverse effects remain, even after the implementation of all feasible mitigation measures, it must balance economic and social benefits against environmental harm to determine if the project should proceed. Pub. Res. Code § 21081(d); 14 Cal. Code Regs. § 15093. This "statement of overriding considerations," as the last step in the analysis, provides critical information to the public to fulfill the law's public disclosure requirement - that the EIR function as "a document of accountability" and "informed self government." *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229. (agency "retains the power to approve a plan that has significant adverse effects upon the environment, so long as it justifies its action in light of "specific economic, social, or other conditions.") However, CEQA requires that the agency identify the adverse effects of the proposed project *before* it exercises that power. *Id.* at 1233.

2. The Initial Study/Negative Declaration Does Not Accurately Describe the Environmental and Regulatory Setting

CEQA requires a full description of the environmental setting in which the project will occur. 14 Cal. Code Reg. § 15125; *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722-723. Here, the environmental setting is not adequately described in a number of respects.

First, the IS/ND does not provide information about the current condition of areas that will be subject to the waiver, including information on the relative sensitivity of such areas to the vegetation management activities. The IS/ND states that it considers the 68,000 acres of projects a "baseline" as to which the waiver will apply. We do not believe this is an accurate characterization, but even if it were, Lahontan must still provide information about the environmental conditions in these areas so the public can be informed about whether certain waiver changes have the potential for significant impacts.

18

Second, no information is given regarding the current state of the Basin in relation to the potential impacts of this project. For example, the State of the Lake Report (2008) states that:

- Primary productivity, the rate at which algae produce biomass through photosynthesis, has been increasing since 1959.
- Primary productivity in 2007 was the highest on record, five times the 1959 level
- Periphyton (attached algae) concentrations were above average in 2007.
- The average minimum air temperature now exceeds the freezing temperature of water, which points to more rain and less snow, as well as earlier snowmelt.
- Snow has declined as a fraction of total precipitation, from an average of 52 percent in 1910 to 34 percent in present times.

19

See UC Davis, Tahoe Environmental Research Center. "Tahoe: State of the Lake Report 2008."

<<http://169.237.166.248/stateofthelake/StateOfTheLake2008.pdf>> (16 Sept. 2008).

Further, no information is given regarding Tahoe's current attainment with regard to water quality objectives for Lake Tahoe and tributary streams and wetlands. In combination with the lack of any detailed discussion regarding the types of habitat on the 68,000 acres, the public has effectively no environmental setting information regarding the project.

20

Third, the IS/ND provides no information about how the 2003 and 2007 Waivers have been implemented and the results of such implementation. This information is critical for the public to assess whether it is appropriate to eliminate the existing conditions of the 2007 Waiver for timber activities in the Tahoe Basin. No information has been provided showing how the conditions have prevented fuel reduction activities from taking place.

21

Further, no information is given as to how action agencies have responded to the waiver conditions, or what result occurs where a project proposes activities that do not meet the current waiver conditions. In that event, Lahontan is required to issue waste discharge requirements. It is our understanding in speaking with staff that the terms of the WDRs issued since the 2003 Waiver closely follow the actual waiver conditions, thereby providing substantive protections in the WDRs that are largely identical to the conditions set forth in the 2003 and 2007 Waivers. However, without any information about how this process has worked, the public lacks adequate information to determine the degree of impacts to the physical environment from Lahontan's present intent to abandon this regulatory regime.

22

Fourth, the IS/ND provides no information or discussion on the current regulatory conditions that apply to timber management, including vegetation management activities, as set forth in the 2007 Waiver. Without this information, the public is not adequately informed about the actual "change" that is occurring from one regulatory regime to another. Instead, the IS/ND suggests that the only change is a transfer of permit authority from Lahontan to TRPA. However, the transfer also effectively eliminates the existing 2007 Waiver conditions, which is not discussed or presented.

23

Finally, the IS/MD does not provide information about the Lahontan's and TRPA's current efforts to meet Basin Plan objectives for water quality and the protection of habitat. No information is provided regarding the current status of the TMDL proceedings, nor information about TRPA's current efforts to update its threshold requirements as required by law.

24

Without this relevant project setting information, it is impossible for the public to know how the proposed Waiver/MOU meets Basin Plan requirements and avoids significant impacts. This is particularly true given the lack of an adequate project description, as set forth below.

//
//
//
//

3. The Initial Study/Negative Declaration Does Not Adequately Describe the Project

CEQA requires that the environmental review document contain a full and accurate description of the proposed project. *See e.g. Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal. App.3d 357, 366; *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal. App.3d 818, 829-831; *County of Inyo v. UCB of Los Angeles* (1977) 71 Cal. App. 3d 185; 14 Cal. Code Reg. § 15124.

Here, the IS/MD does not meet the test for project description in several ways.

First, the IS/MD does not acknowledge that this project repeals the existing waiver conditions that Lahontan currently applies to timber activities. Instead, the project description misleadingly suggests that the only “project” at issue is the transfer of permitting authority. However, the project is actually replacing an existing regulatory regime based on the existing waiver/MOU and replacing it with a different one, which is not described and apparently has not yet been formulated.

25

Second, the IS/MD does not describe a critical component of the project which is how TRPA intends to regulate these activities. Were Lahontan to propose to revise its existing waiver via a vis other action agencies such as CDF or the Forest Service, it would be required under CEQA to provide information about the new conditions and procedure that would occur under the new waiver. Here, the IS/ND attempts to avoid this issue by characterizing the project as simply a transfer of authority to TRPA. However, the “transfer” has the same effect as a substantive change in the waiver, except for here there is no information about the new permitting conditions between the action agencies and TRPA. This includes basic information regarding how TRPA will address monitoring, activities on steep slopes and within SEZs, exemptions or semi-exemptions from project review and granting of discharge prohibitions. Without any information regarding these project components, it is impossible for the public or any agency to gauge the impacts of the proposed action.

26

Third, the IS/ND does not adequately describe the overall project as a whole, as required by CEQA. Here the waiver is a component of a larger project, which is the implementation of 68,000 acres of fuel reduction activities that has been prioritized for the Basin over the next decade. While the IS/ND characterizes the project as simply the transfer of permitting authority, this transfer is a central component of how the regulation of 68,000 acres of fuel reduction activities will be implemented and, further, purports to delineate Lahontan’s role, even though the actual process of regulation has not yet been defined. Under CEQA, this overall action should be evaluated as the project, review for which should wait until TRPA has settled on its proposed procedure and conditions for implementing the waiver and MOU. *See McQueen v. Board of Directors of the Mid-peninsula Regional Open Space District* (1988) 202 Cal. App.3d 1136, 1143 (“Project’ is given a broad interpretation in order to maximize protection of the environment.”)

27

We believe that Lahontan’s role in this process, and the question of which conditions shall

28

be applied in the field by TRPA for activities subject to the waiver, are core components of how the overall 68,000 acre fuel reduction project will be implemented. *See* Exhibit 1, attached hereto. As such, they must be addressed as part of this larger project, in order to determine whether or not impacts will be significant. *See also* Section III.C.7-8, *infra*, discussing segmentation and cumulative impacts.

28

4. The Proposed Waiver/MOU Will Supersede the Conditions Designed to Protect Water Quality That Exist in the Current Waiver and Thus Has the Potential for Significant Impacts under CEQA

Under CEQA, where there is substantial evidence in the record supporting a fair argument of potentially significant environmental impacts, an agency is required to prepare an EIR, rather than a negative declaration. *See* 14 Cal. Code Reg. § 15064(f)(1). Here, there is considerable evidence that the proposed action has the potential for significant impacts.

As set forth above, the proposed waiver/MOU discusses the project as a simple transfer of permitting authority. However, the actual proposal will effectively repeal the existing waiver conditions and replace them with a generally worded MOU that would allow for activities with the potential for significant impacts that currently would not be eligible for a waiver.

29

Resolution R6T - 2007-0008 states that the 2007 Waiver conditions were adopted to “assure protection of beneficial uses of waters of the state,” and to “ensure that timber harvest activities will be protective” of these waters. These conditions including a general requirement for monitoring, as discussed above, and numerous conditions that must be met for each of six categories of timber harvest type activities to obtain a waiver. Many of these conditions are substantive, not simply procedural. These include many substantive provisions that would protect water quality including detailed monitoring requirements, inspection standards, access to self-monitoring, review periods prior to project commencement, requirements that a project adhere to Basin Plan prohibitions, slope restrictions, no activities within stream buffers, no heavy equipment in SEZs and floodplains, no herbicides, no mechanical treatment during winter periods etc, review of project site by qualified personnel. *See* 2007 Waiver, Attachment A to Resolution No. R6T-2007-0008, pp. 4-16.

In contrast, the proposed waiver/MOU do not set forth the substantive protections that TRPA will place on its regulation. The MOU states instead that:

TRPA will have responsibility for reviewing vegetation management activity proposals, issuing permits as appropriate, conducting inspections, and taking enforcement action as necessary to ensure compliance with permits and applicable regulations. This includes exempt and qualified exempt activities, as defined in the TRPA Code of Ordinances.

MOU, p. 2, ¶ 1. The MOU states that TRPA will “consult” with Lahontan on proposed vegetation management activities involving a) permanent stream crossings; b) “wet” crossings (vehicles crossing through a channel when water is present) c) herbicide/pesticide use; d) New road

construction over 3000 linear feet or new or temporary road construction on slopes over 30 percent; e) Treatment areas of more than five hundred (500) total acres or one hundred (100) acres of verified stream environment zone lands and f) Equipment operations on slopes over 30 percent. *Id.*, p. 4.

29

This demonstrates that projects containing these attributes will be eligible for a waiver, whereas before they would not have been. Yet the IS/ND provides no discussion of the impacts of these types of projects on water quality and sensitive habitats in the Basin. Further, the MOU is clear that such consultation shall *not* alter the continuation of project activities. *See id.* (“Consultation activities will occur in a manner that does not alter the normal permitting time that the lead permitting agency is committed to follow and lack of timely response by the other agency will not delay project permitting.”) (emphasis added.)

The MOU also transfers authority to TRPA to make determinations regarding exemptions to discharge prohibitions for SEZ disturbance. *Id.*, p. 3, ¶ 6 (“The agency issuing a permit for the vegetation management activity, whether TRPA or the Water Board, will be solely responsible for approval of exemptions to prohibitions related to SEZ disturbance.”) Thus, projects may now be eligible for a waiver even though they can violate discharge prohibitions in the SEZ so long as TRPA grants an exemption.

30

As discussed in our scoping comments, a broad exemption from discharge prohibitions for vegetation management activities has the potential for significant impacts to water quality. The discharge prohibitions are substantive mandates set forth in the Basin Plan to ensure that water quality objectives are met and that future TMDLs can be achieved. Fuel reduction logging has the potential to discharge sediment and vegetative material into stream courses, which will adversely affect Basin Plan objectives. As a result, a categorical exemption for such activities from Basin Plan prohibitions against discharge of such pollutants will contribute to cumulatively significant impacts, which would appear to violate Basin Plan standards, water quality objectives, and future TMDL compliance.

31

As discussed above, there is no description of how TRPA intends to implement its proposed authority to oversee 68,000 acres of fuel reduction in the Basin. There is no discussion of what TRPA’s code requires or whether projects will be exempted for review altogether. Thus it is impossible to accurately assess the impacts of the proposed repeal of the existing waiver conditions. To the extent information does exist, it suggests that TRPA will not impose conditions for waivers to occur, *see* Exhibit 11, attached hereto, that TRPA is considering allowing many types of activities in sensitive environments that previously would either not have been allowed or been subject to WDRs from Lahontan and that TRPA is proposing to exempt fuel reduction activities from any project specific review. *See* Exhibit 1, attached hereto.³ *See also* Exhibit 8 (3rd Creek Checklist.)

32

³These include revision of TRPA’s MOU with the Forest Service (item 24), adopt as a number one priority the avoidance of catastrophic wildfire (item 52); allowance of temporary road construction (item 67), allowance of mechanized equipment in SEZs (item 68), development of “cost effective” monitoring (item 68). *See* Exhibit 1, attached hereto.

Given the lack of information as to how vegetation management activities will be regulated, the IS/ND should have assumed that the existing conditions of the 2007 waiver would no longer be applicable, and thus analyzed the impacts of removing such conditions.⁴

Considerable evidence suggests that these vegetation management activities have the potential for significant impacts to both water quality and SEZ habitat. The available science reveals a consensus that forestry and fuel reduction practices have the potential to negatively impact water quality and riparian habitat. For example, mechanical treatments in forests can produce negative ecosystem effects such as soil disturbance and compaction, disruption of nutrient cycling, damage to residual trees, and enhancement of root pathogens (Stephens and Moghaddas, 2005).⁵ Another serious adverse impact of forest harvesting and fuel reduction activities is the potential to increase nutrient inputs to aquatic systems (i.e., nitrogen loading), which can have an eventual impact on surface water quality and biotic response (Hazlett, et al., 2006). Hazlett also observed increases in nitrogen movement from terrestrial portions of a watershed in boreal forests of northeastern Ontario into surface waters that occurred several years after the forest harvesting/management activity took place. Observations such as these should be taken as a warning that the cumulative impacts of forestry and fuel reduction practices are not conclusive and that more research and scientific study is needed to determine the exact outcome that the proposed vegetation management activities of this MOU will have on the water quality of Lake Tahoe. *See Exhibit 12, attached hereto.*

Further, the construction of roads that TRPA would be more likely to permit has the potential for significant impacts to water quality and wildlife habitat:

The effects of roads on aquatic habitat are believed to be widespread, although direct...At the landscape scale, correlative evidence suggests that roads are likely to influence the frequency, timing, and magnitude of disturbance to aquatic habitat. Increased fine-sediment composition

⁴In the scoping documents, Lahontan appears to have originally intended to set forth new conditions whose relative level of protection could be compared to existing levels, including 1) describing projects that would pose a potential threat to water quality include proposed methods of tree removal, size and sensitivity of the project area; 2) allowing over-the-snow timber operations with reduced monitoring and reporting; 3) elimination of project information submission for vegetation management activities to be completed by hand crews; 4) allowing the placing and burning slash piles in SEZs; and 5) allow prohibition exemption for certain types of projects that meet specified criteria and incorporate specific design features which will avoid significant impacts to water quality and beneficial uses of waters of the State. However, this approach has apparently been dropped in favor of providing no information as to the conditions under which future projects will occur.

⁵*See* Stephens S. L., and Moghaddas J. J. 2005. Silvicultural and reserve impacts on potential fire behavior and forest conservation: Twenty-five years of experience from Sierra Nevada mixed conifer forests. *Biological Conservation* 125, 369-379.

in stream gravel-a common consequence of road-derived sediments entering streams- has been linked to decreased fry emergence, decreased juvenile densities, loss of winter carrying capacity, and increased predation of fishes and can reduce benthic organism populations and algal production. Roads can act as barriers to migration, lead to water temperature changes, and alter streamflow regimes. Improper culvert placement where roads and streams cross can limit or eliminate fish passage. Roads greatly increase the frequency of landslides, debris flow, and other mass movement. At the landscape scale, increasing road densities and their attendant effects are correlated with declines in the status of some non-anadromous salmonid species.Several studies correlate road density or indices of roads to fish density or measures of fish diversity. Mechanisms include effects of fine sediment, changes in streamflow, changes in water temperature caused by loss of shade cover or conversion of groundwater to surface water, migration barriers, vectors of disease, exotic fishes, changes in channel configuration from encroachment, and increased fishing pressure.

Increased fine-sediment composition in stream gravel has been linked to decreased fry emergence, decreased juvenile densities, loss of winter carrying capacity, and increased predation of fishes. Increased fine sediment can reduce benthic organism populations and algal production....Increased sediment reduces populations of benthic organisms by reducing interstitial spaces and flow used by many species and by reducing algal production, the primary food source of many invertebrates (Chutter 1969, Hynes 1970). Road effects on aquatic habitat and population response are well documented and overwhelmingly negative, but results differ among sites.

See USDA, Pacific Northwest Research Station. 2001. Forest Roads: A Synthesis of Scientific Information. General Tech. Report PNW-GTR-509.

Other studies provide further support that timber activities have the potential for significant impacts to water quality and habitat.

For example, in Bisson, P.A., Rieman, B.E., Luce, C., Hessburg, P.F., Lee, D.C., Kershner, J.L., Reeves, G.H., and Gresswell, R.E. 2003. Fire and aquatic ecosystems of the western USA: current knowledge and key questions. *Forest Ecol. Mang.* 178, 213-229, the authors noted:

- “To protect aquatic ecosystems we argue that it will be important to: (1) accommodate fire-related and other ecological processes that maintain aquatic habitats and biodiversity, and not simply control fire or fuels; (2) prioritize projects according to risks and opportunities for fire control and the protection of aquatic ecosystems; and (3) develop new consistency in the management and regulatory process. Ultimately, all natural resource management is uncertain; the role of science is to apply experimental design and hypothesis testing to management applications that affect fire and aquatic ecosystems.”
- “Wildfire, fuels management, and fire suppression activities can all alter aquatic and riparian ecosystems.....land management activities often have resulted in negative effects to

aquatic and riparian systems (Rieman et al., this issue)....”

- “[S]everal of the action items in the National Fire Plan have not been fully tested and their ecological consequences are uncertain.”
- “With continued warming, large fires and substantial changes in forest vegetation may be anticipated whether current fuel accumulations are reduced or not (Morgan et al., 2001; Whitlock et al., this issue).”
- “The implementation of aggressive fuels and fire management has begun. Although such activities may affect wildfire behavior under some conditions, the more challenging goal of restoring or developing landscapes and ecosystems that are resilient to disturbance (Ludwig et al., 1997) remains elusive.”
- “Essentially, managers hope to move quickly to mitigate the threat of uncharacteristically severe fires and their anticipated effects. Regulators concerned about aquatic resources fear that the effects of management (e.g. soil disturbance, road building, and increased erosion) may represent a greater threat to aquatic ecosystems than the fires themselves.”
- “The urgency to reduce the threat of large fires, however, means that consideration of aquatic resource values is often a reactive rather than proactive process. As a result inclusion of aquatic considerations may be seen as constraint on fire and fuels management options rather than an integral part of broader ecosystem management. Objectives by the National fire Plan, including fire and fuels management projects, may conflict with those developed under the Endangered Species Act (ESA) and resulting species recovery projects. Integration occurs through the process of consultation, often after projects are well underway.”
- “Populations of aquatic organisms often are depressed in the same areas where severe fires are likely and fuels treatments will be targeted.”
- “Despite, its strong scientific basis and emphasis on learning, examples of successful application of adaptive management are scarce.”
- “In the case of fire, fuels, and aquatic ecosystems management, many potential actions involve competing risks, e.g. the risk of affecting, sensitive aquatic species versus the risks to people, property, or other resources from fire.”
- Adaptive and passive management approaches both “require: (1) well-articulated hypotheses of how ecosystems will behave; (2) commitment to monitoring and rigorous data gathering; (3) creative, yet rigorous analytical approaches to provide inferences based on data. Analytical approaches must facilitate evaluation of the ecological importance of statistically significant observations.”

See Exhibit 4, attached hereto.

In Reiman, B., Lee, D., Burns, D., Greswell, R., Young, M., Stowell, R., Rinne, J., and Howell, P. Status of native fishes in the western United States and issues for fire and fuels management. 2003. *Forest Ecology and Management*, 178, 198-211, the authors noted:

- “[M]ajor new efforts to actively manage fires and fuels in forests throughout the region may be perceived as a threat rather than a benefit to conservation of native fishes and their habitats. ...Management of forests, for example, has generally been viewed as an impact on aquatic systems...Significant questions regarding the influence of fire on aquatic ecosystems, changing fire regimes, and the effects of fire-related management remain unresolved and contribute to the uncertainty.”
- “An important assumption is that mitigation of changing fire patterns will directly benefit watersheds and habitats for sensitive species. As we discuss later this assumption may hold in some contexts, but not others. Clearly, past management activities contributed to the disruption and degradation of watersheds and habitats for fishes (Lee et al., 1997). Aggressive fuels treatments that mimic past land management activities (e.g. timber-harvest) could simply exacerbate the problem.”
- “Alternatively, logging and thinning intended to remove fuels or to replace fire may ultimately remove a legacy of materials that would structure aquatic habitats in the future. Management intended to replace or mimic the effects of fire may look nothing like those fires from a watershed perspective (Reeves et al., 1995). Because management often involves repeated entry and the maintenance of an infrastructure including roads, the negative effects of management can be chronic or persistent compared to the acute and periodic effect of fire (Reiman and Clayton, 1997). Species that evolved in variable environments may be adapted to the periodic or pulsed events, but not the chronic ones (Poff and Ward, 1990).”
- “Because many of the remnant populations of fishes are already depressed, small or isolated, they lack the resilience, diversity, or demographic support to rebound from disturbance....Aggressive management of fire and fuels will often require an infrastructure of roads and stream crossings that will likely perpetuate the disruption to streams and the expansion of non-native taxa.”

See Exhibit 6, attached hereto.

In “Introduction to the effects of wildland fire on aquatic ecosystems in the Western USA. 2003. *Forest Ecology and Management*, 178, 1-3, the authors noted:

- “The management of fire is particularly relevant to the aquatic ecosystems of the Western USA. More than a century of human development has produced a legacy of habitat, degradation, fragmentation, and loss and an expansion of nonnative species across the lakes,

ivers, and streams of the region. The result has been the accelerated extinction of species and stocks and increased listings of them under the Endangered Species Act and of impaired waters under the Clean Water Act. Because past land management is perceived as a primary cause of the disruption of aquatic ecosystems, new proposals for aggressive management of forest vegetation and fuels to mitigate the increasing risks of severe fire have been viewed with skepticism and concern.”

See Exhibit 3, attached hereto.

In Dwire, K.A., and Kauffman, J.B. 2003. Fire and riparian ecosystems in landscape of the western USA. Forest Ecology and Management, 178, 61-74, the authors noted:

- “Given the critical resource values of riparian zones, additional data are needed to understand interactions between fire and riparian ecosystems, and how riparian zones affect spatial and temporal patterns of fires at the landscape scale. An improved understanding of fire ecology and effects in riparian areas is needed to prescribe ecologically sound rehabilitation projects following fire.”
- “More recently, there has been increased interest in the effects of fire on aquatic habitats and stream biota (Minshall et al., 1989; Minshall et al., 1997; Greswell 1999, Bisoon et al., 2003). Despite the recognized linkages between streams and riparian zones, however, few studies have directly addressed the effects of fire on riparian ecosystems....and little is known about the fire properties and fire history of most riparian areas of the western USA.”
- “Impacts of land use and management may strongly influence the fire properties in some riparian areas. Where streams and riparian areas have been degraded by land and water use, fire properties may begin to resemble the drier uplands.”

See Exhibit 5, attached hereto.

These and numerous other studies support Lahontan’s findings when it adopted its 2003 and 2007 waivers that vegetation management activities such as those proposed for a waiver in this project have the potential for significant impacts. See Exhibits 9-10, attached hereto.

Further, the SNEP Report and the Sierra Nevada Framework decision both reiterate the potential that timber activities, including fuel reduction activities, have the potential for significant impacts to the environment, particularly aquatic habitats that Lahontan is charged to protect, in the absence of specific regulatory controls that may avoid such impacts. See Exhibits 2, 7, attached hereto; Exhibit 2, Ch. 30 (“As harvesting moves to less desirable and steeper ground, risk of erosion and mass failure will increase. Avoidance of lands sensitive to disturbance, such as slopes greater than 60%, streams with soil-covered inner gorges, riparian areas, meadows, and known landslides, will minimize erosion associated with timber harvest.”)

34

The SNEP Report was careful to point out that fuel reduction activities, if not properly regulated, had the potential for significant impacts and thus recommended a comprehensive approach to address the problem:

The ecological health of a stream is affected by all activities in its watershed. Those activities that directly control the flow regime or occur within the riparian zone usually have the greatest potential impacts....Management of forest fuels to reduce the risk of catastrophic fire must include thorough consideration of aquatic impacts and mitigation measures. If a major program of fuels treatment is started, a dedicated team of soil scientists, hydrologists, and aquatic ecologists should be involved in the planning and execution of such a program on local administrative units. A team of specialists, on either a zone or regional level, is also needed to monitor and evaluate the long-term effects of postfire treatments. Their experience could develop a rational set of best management practices for dealing with burned landscapes. Prevention of further degradation and correction of existing water-related problems is expensive, as the Lake Tahoe experience has demonstrated. Rehabilitation of forest roads and restoration of degraded streams will require substantial investment. ...

See Exhibit 2, Ch. 56.

We reiterate our request from the scoping comments that Lahontan reconsider its approach here and instead initiate revisions, if any, to its waiver/MOU as part of a comprehensive reform package that fully sets forth the operational details of the overall fuel reduction project.

5. The Proposed Waiver/MOU Will Supersede Procedural Protections for Water Quality That Exist in the Current Waiver and Has a Potential for Significant Impacts under CEQA

The Resolution directs the Executive Officer to enter into a MOU with TRPA describing the “application review and permitting procedures, notification and coordination responsibilities, dispute resolution procedures, and general provisions.” However, the MOU and Waiver do not provide information on TRPA’s “application review and permitting procedures.”

35

Here there is evidence that TRPA intends to exempt permitting for vegetation management activities from any public review process. As discussed in our scoping comments, this approach was taken in the Third Creek project, which eliminated riparian habitat based on a theory regarding nutrient output that was both untested and unreviewed. See Exhibit 8, attached hereto. See also Exhibit 11 (TRPA waiver of Forest Service activities.)

36

It is our understanding based on our queries of TRPA staff that the recently-formed "Tahoe Fire and Fuels Team" (TFFT), which includes representatives from all Fire agencies with jurisdiction in the Basin and TRPA and Lahontan Water Board staff, will serve to implement a program for fuel reduction activities. Specifically, the TFFT plans to review (and prioritize) projects throughout the winter months and address project implementation and mitigation, as applicable. As we understood

this, the result will be that project activities, conditions and any mitigation needs will already have been determined by the TFFT prior to 'official' application to the regulatory agencies. Additionally, the TFFT is currently working on the development of a checklist, much like TRPA's current "Initial Environmental Checklist" (IEC), that will specifically address fuels reduction projects (rather, all project types listed under no. 12, which include more than fuels reduction).

We are concerned that none of this activity has been disclosed or discussed as part of the CEQA documentation for the proposed action and, as discussed below, Lahontan's intent to make findings that the proposed waiver/MOU will not result in significant impacts before this process has been completed is contrary to CEQA. Further, the elimination of public process has the potential to lead to significant impacts due to the loss of effective public participation in the project approval process.

37

The importance of public review is stated in the text of CEQA. Public Resources Code § 21003.1 provides that it is the policy of the state that:

(a) Comments from the public and public agencies on the environmental effects of a project shall be made to lead agencies as soon as possible in the review of environmental documents, including, but not limited to, draft environmental impact reports and negative declarations, in order to allow the lead agencies to identify, at the earliest possible time in the environmental review process, potential significant effects of a project, alternatives, and mitigation measures which would substantially reduce the effects.

(b) Information relevant to the significant effects of a project, alternatives, and mitigation measures which substantially reduce the effects shall be made available as soon as possible by lead agencies, other public agencies, and interested persons and organizations.

The implementation of these statutory purposes is set forth under CEQA provisions establishing the obligation of the lead agency to circulate for public review and comment a negative declaration and/or an environmental impact report prior to taking any final action on a project subject to CEQA. *See* Pub. Res. Code § 21091 (Review Periods); § 21092 (Public Notice.) CEQA provides that noncompliance with these information disclosure provisions “may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.” *See* Public Resources Code § 21005.

The CEQA guidelines support the importance of public review. Section § 15201. (“Public Participation”) states:

Public participation is an essential part of the CEQA process. Each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities.

The Guidelines Section 15200 sets forth the following policies served by public review of EIRs and negative declarations: (a) Sharing expertise; (b) Disclosing agency analyses; (c) Checking for accuracy; (d) Detecting omissions; (e) Discovering public concerns; and (f) Soliciting counter proposals. *See also* § 15105 ("Public Review Period for a Draft EIR or a Proposed Negative Declaration or Mitigated Negative Declaration.")

The right of the public to review and comment is essential to the proceedings under CEQA for several reasons. First, public review and comment informs those who ultimately make important decisions regarding the environment. *Dixon v Superior Court* (1994) 30 Cal App. 4th 733. As noted by the Supreme Court in *Laurel Heights, supra*, 47 Cal. 3d at 391:

The Legislature has made clear that an EIR is "an informational document" and that "[the] purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (§ 21061; Guidelines, § 15003, subds. (b)-(e).)

The public's right to review and comment on an EIR also serves the complementary purpose of informing citizens as to the intended actions of their elected and appointed officials. As noted by the Supreme Court:

An EIR is an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86; Guidelines, § 15003, subd. (d).) Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. []; Guidelines, § 15003, subd. (e).) The EIR process protects not only the environment but also informed self-government.

Laurel Heights, supra, 47 Cal. 3d at 392. *See also* *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal. App. 3d 1043, 1052; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197 ("One of [an EIR's] major functions . . . is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed"); *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal. App.3d 813, 823 ("The requirement of public review has been called "the strongest assurance of the adequacy of the EIR"); *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal. App.3d 357, 365 ("The value of an EIR is as an informational document...It is 'the 'heart' of CEQA, the principal method by which environmental data are brought to the attention of the agency and the

public"); *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App.3d 421, 431 (“A cumulative impact analysis which understates information concerning the severity and significance of cumulative impacts impedes meaningful public discussion and skews the decisionmaker's perspective concerning the environmental consequences of the project, the necessity for mitigation measures, and the appropriateness of project approval.”)

6. The IS/ND does Not Consider Alternatives to a Complete Waiver of Lahontan’s Permitting Authority

Under CEQA, a lead agency is required to consider a reasonable range of alternatives to the proposed action. In addition, an EIR must identify mitigation measures and alternatives to the project which may reduce or avoid the project’s significant adverse impacts, thus accomplishing CEQA’s basic statutory goals. *See Laurel Heights, supra*, 47 Cal.3d at 400-403; *Citizens of Goleta Valley v. Board of Supervisors, supra*, 52 Cal.3d at 564; Pub. Res. Code §§ 21002, 21002.1.

Here, Lahontan does not consider any alternatives to a wholesale transfer of its regulatory authority to TRPA. The project purpose is stated as responding to the need to streamline the permit review process in areas of overlapping TRPA and Lahontan jurisdiction. However, there are other alternatives that could be considered to achieve this purpose besides simply turning over day to day permitting authority to TRPA, before TRPA has disclosed or even determined what its procedures and substantive standards will be for reviewing these projects.

As discussed above, not only has Lahontan failed to consider alternatives to the blanket waiver it is proposing to grant to TRPA, the IS/MD provide no information whatsoever regarding the “no project” alternative, which would be the continuation of Lahontan’s present waiver/WDR system for timber activities with the potential for adverse effects on water quality and habitat. Thus, not only has Lahontan failed to consider a no-project alternative according the narrow manner in which it has defined this project, it has provided no information for the public to make its own evaluation of 1) the need for the project; and 2) the potential difference in environmental protection that will occur due to the transfer of authority from Lahontan to TRPA. The failure to consider and discuss the no-project alternative is a violation of CEQA. *See* 14 Cal. Code Reg. § 15126.6(e).⁶

⁶The failure to consider the no project alternative also undermines the public’s understanding of precisely the need for intensive fuel treatments in sensitive areas such as SEZs. For example, the SNEP report notes that “A network of DFPZs that define discrete blocks of land would require some DFPZ segments to cross drainages. Decisions about how best to deal with stream crossings should be based upon site-specific analyses. In most cases, however, we anticipate that the function of a DFPZ network would not be seriously jeopardized by limiting any treatments within the riparian zone portion of a DFPZ to those treatments (if any) deemed acceptable elsewhere in the riparian zone. Prescribed burning might be particularly appropriate as a treatment. Because of their relatively moist environment, untreated or minimally treated riparian zones normally should not present an undue risk of serving as a “fuse” to spread fire across a DFPZ adequately staffed with suppression forces.” *See* Exhibit 2, Ch. 56, attached hereto.

7. The IS/ND does not Assess the Cumulative Impacts of this Project In Combination with Foreseeable Future Projects

CEQA requires agencies to consider the cumulative impacts of the proposed project, in combination with past, present and reasonably foreseeable future projects. Here, the IS/ND does not attempt to analyze the cumulative impacts of removing the 2007 waiver permitting conditions on up to 68,000 acres of fuel reduction projects that are proposed for the Basin. Instead, as discussed above, the project is described as the simple transfer of permitting authority.

39

As discussed in TRPA's recent Board packet, the Fire Commission recommendations call for a single environmental analysis and review process (e.g. EIS/EIR) to reach agreement on project specifications, permit conditions, (if applicable), and monitoring for fuel reduction projects, which agencies may rely on in addressing individual projects. *See* Exhibit 1, attached hereto. Here, however, there appears to be no mechanism whereby the cumulative effects of transferring water quality permitting authority to TRPA and subsequent implementation of that authority across 68,000 acres in the Basin will be addressed.

Under CEQA, the cumulative impacts of the MOU/Waiver should be addressed by treating the Waiver/MOU as part of a single coordinated "project," which, as discussed above, would include the subsequent implementation by TRPA of its permitting program applicable to the 68,000 acres to be treated. This approach satisfies CEQA's requirement that projects be considered to be the whole of an action, which may involve different approvals by different agencies. *See* 14 Cal. Code Reg. § 15378(a) ("Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."); *See McQueen v. Board of Directors, supra*, 202 Cal. App.3d at 1143 ("Project" is given a broad interpretation in order to maximize protection of the environment.")

Even if Lahontan were to attempt to limit its project definition to the transfer of permitting authority to TRPA pursuant to the proposed waiver/MOU, the subsequent implementation of TRPA's permitting of 68,000 acres of fuel is a foreseeable future project that must also be analyzed. *See e.g.*, 14 Cal. Code Reg. § 15064(h)(1) ("An EIR must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. 'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.")⁷

40

⁷The IS/ND states that the existing level of foreseeable future projects is a "baseline" which does not affect Lahontan's analysis of the waiver/MOU's potential cumulative impacts. However, these foreseeable future projects do not constitute a "baseline" since they have not yet occurred, much less been proposed, as individual projects. *See Environmental Planning and Information Center v. County of El Dorado* (1982) 131 Cal. App. 3d 350, 358 (The comparisons utilized in the EIRs can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts which would result. There are no extensive,

Finally and in addition to the points raised above, the impacts of TRPA's implementation of permitting for the 68,000 acres of fuel reduction activities is an indirect consequence of the waiver, and thus must be analyzed under CEQA. *See* 14 Cal. Code Reg. § 15064(d)(2) ("In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project... An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project.")

Here, the "project," even if defined narrowly, will result in TRPA and not Lahontan, becoming the primary permitting entity for fuels reductions projects in the Basin. As discussed, the effects of that change are potentially significant. Thus, no matter how Lahontan chooses to view its CEQA responsibilities here, it cannot avoid analyzing the potentially significant impacts that will result if TRPA rather than Lahontan exercises primary permitting authority over the 68,000 acres of planned fuel reduction. As discussed above, and in compliance with the Fire Commission's recommendation, this analysis can only occur after TRPA has decided on its permitting approach and presented that information as part of an overall cumulative impact analysis intended to ensure that significant environmental impacts are avoided where feasible. *See* Pub. Res. Code § 21002.

41

8. The IS/ND Improperly Defers the Identification of Mitigation that Might Avoid Potentially Significant Impacts

As discussed above in Section III.C.3, Lahontan has not considered nor provided any information about how TRPA will avoid the potential for significant impacts through its own permitting process. This approach is contrary to CEQA in several respects.

First, Lahontan cannot defer the identification of mitigation measures that might avoid significant impacts. *See e.g., Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1601-1602 ([W]e note the City cannot rely upon postapproval mitigation measures adopted during the subsequent design review process"); *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 884 ("There cannot be meaningful scrutiny of a mitigated negative declaration when the mitigation measures are not set forth at the time of project approval"); *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 308-309 ("By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process"); Pub. Res. Code, § 21003.1; 14 Cal. Code Reg. § 15071(c) (negative declaration under CEQA shall include any mitigation measures prior to being circulated for public review.)

Here, Lahontan has not discussed the types of mitigation that would ensure that TRPA's

detailed evaluations of the impacts of the proposed plans on the environment in its current state. Accordingly, the EIRs fail as informative documents.")

42

takeover of Lahontan's permitting authority will avoid significant impacts. *See* Exhibit 2, Ch. 30 ("Much can be done to protect water quality simply by avoiding activities in sensitive areas, such as riparian zones, areas susceptible to mass movement, and areas where soils may become saturated and produce overland flow.") As set forth in *Sundstrom v. County of Mendocino*:

42

Environmental problems should be considered at a point in the planning process "where genuine flexibility remains." [] A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.

202 Cal. App. 3d at 307. Similarly, in *Oro Fino Gold Mining Corp.*, *supra*, the court noted:

One of the purposes of the [EIR] is to insure that the relevant environmental data are before the agency and considered by it prior to the decision to commit . . . resources to the project[I]n the absence of overriding circumstances, the CEQA process demands that mitigation measures timely be set forth, that environmental information be complete and relevant, and that environmental decisions be made in an accountable arena.

225 Cal. App. 3d at 884.

Lahontan is making the commitment to enter into a waiver giving TRPA primary and lead authority over permitting fuel reduction projects in the Basin before any information has been presented as to how TRPA intends to ensure that its permitting of these projects will avoid significant impacts on the environment. As discussed above, this approach is not in the public interest and further, violates CEQA.

43

Second, by approving the waiver but deferring any consideration of TRPA's permit process for the 68,000 acres to a later date, Lahontan is unlawfully segmenting the necessary environmental analysis into discrete actions, thereby avoiding any analysis of the overall action that is taking place. *See Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-284 (CEQA requires that "environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment."); 14 Cal. Code Reg. § 15378(a),(c) (agency must consider project as the "whole of the action," even where different permits may be required); *Azusa Land Reclamation Company, Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App. 4th 1165, 1188-1191 (approval of existing landfill is "project due to lack of environmental review and projected increase in use.)

44

9. The IS/ND Improperly Relies on TRPA's Duty to Comply with the Basin Plan to Find that there will be No Impact from the Waiver/MOU

The IS/ND states that there will be no impacts from the transfer of authority from Lahontan to TRPA because TRPA is bound to comply with the 208 Plan and Basin Plan, the same as

Lahontan. However, this reliance is misplaced for two reasons.

First, as discussed above, the proposed waiver/MOU eliminates existing protective conditions that may no longer apply to future projects. The CEQA documents do not contain 1) information how TRPA proposes to regulate vegetation management activities; 2) no information is provided as to how TRPA will comply with Basin Plan standards. In the meantime, evidence suggests that TRPA may allow projects on steep slopes or use of heavy equipment in SEZs, which have the potential for physical impacts on the environment that would not have been eligible under the existing waiver. *See e.g.*, Exhibit 1, attached hereto.

45

Under CEQA, a lead agency must analyze the actual physical impacts occurring due to a proposed project, including the elimination of protective conditions, and cannot rely on the assurance of regulatory compliance as a way to avoid assessing potential environmental impacts. *See Environmental Planning and Information Center v. County of El Dorado* (1982) 131 Cal. App. 3d 350 (CEQA “has clearly expressed concern with the effects of projects on the actual environment upon which the proposal will operate.”)

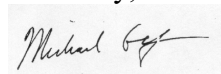
Second, also discussed above, TRPA at this time is out of compliance in establishing its own thresholds for water quality. There is no existing TMDL and thus no mechanism for TRPA to determine what level of discharge is acceptable. To the extent that proposed TMDLs are in place, they are based on unsubstantiated assumptions with respect to the foreseeable increases in discharge from the proposed activities. *See Discussion, supra.*

46

IV. CONCLUSION

Lahontan has traditionally played a critical role in protecting water quality within the Tahoe Basin. We believe that Lahontan is now reacting to political pressure to dispense with its traditional and legally required authority over projects that have the potential to take us further away from the attainment of water quality objectives for the Basin. This is not a necessary result, as the evidence shows that streamlined permitting processes can be achieved as part of a full plan describing how 68,000 acres of fuel reduction will take place. We thus ask that the Board consider these comments and not approve the proposed Waiver/MOU.

Sincerely,



Michael Graf
Sierra Forest Legacy



Jennifer Quashnick
Sierra Forest Legacy -
Sierra Club



Carl Young/FS
League to Save Lake
Tahoe

EXHIBIT LIST

- Exhibit 1: Excerpts from Executive Director Report to TRPA Governing Board and Agency Work Program Priorities for September, August 18, 2008 Subject: Forest Fuels Reduction Program
- Exhibit 2: Sierra Nevada Ecosystem Project (SNEP) Report, Chapter 30 (Hydrology and Water Resources); Chapter 36 (Status of Riparian Habitat), Chapter 56 (Landscape-Level Strategies for Forest Fuel Management.)
- Exhibit 3: Editorial: Introduction to the effects of wildland fire on aquatic ecosystems in the Western USA. 2003. *Forest Ecology and Management*, 178, 1-3.
- Exhibit 4: Bisson, P.A., Rieman, B.E., Luce, C., Hessburg, P.F., Lee, D.C., Kershner, J.L., Reeves, G.H., and Gresswell, R.E. 2003. Fire and aquatic ecosystems of the western USA: current knowledge and key questions. *Forest Ecol. Mang.* 178, 213-229.
- Exhibit 5: Dwire, K.A., and Kauffman, J.B. 2003. Fire and riparian ecosystems in landscape of the western USA. *Forest Ecology and Management*, 178, 61-74.
- Exhibit 6: Reiman, B., Lee, D., Burns, D., Gresswell, R., Young, M., Stowell, R., Rinne, J., and Howell, P. Status of native fishes in the western United States and issues for fire and fuels management. 2003. *Forest Ecology and Management*, 178, 198-211.
- Exhibit 7: USDA Forest Service 2001. Sierra Nevada Forest Plan Amendment, Final Environmental Impact Statement. Pacific Southwest Region. January 2001, Part 3.4., Aquatic, Riparian, and Meadow Ecosystems.
- Exhibit 8: 3rd Creek Environmental Checklist/Initial Study
- Exhibit 9: Lahontan Initial Study/Negative Declaration for 2003 Waiver
- Exhibit 10: Lahontan Response to Comments on 2007 Waiver
- Exhibit 11: TRPA Letter to Forest Service re South Shore Project and Attached TRPA-FS MOU.
- Exhibit 12: Hazlett, P. W., A. M. Gordon, R. P. Voroney, and P. K. Sibley. 2007. Impact of harvesting and logging slash on nitrogen and carbon dynamics in soils from upland spruce forests in northeastern Ontario. *Soil Biology and Biochemistry* 39, 43-57.
- Exhibit 13: Management Agency Agreement with United States Forest Service - Best Management Practice Evaluation Program, Nov. 16, 2006.